

Law and Narrative: Telling Stories in Court.

A review of *Stories at Trial* by Audun Kjus (Deborah Charles Publications, 2011), 212 pp, Hbk £29.95, ISBN 978-1-906731-08-3

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Law lives on narrative... the law is awash in storytelling.¹

Interest in law and literature is a long overdue recognition of the overlap between these two fields although, to some extent, one suspects that most interest appears to be generated by law *in* literature rather than law *as* literature.² At its best, law *in* literature can provide valuable insights into the nature of law and legal rationality,³ but treating law *as* literature,⁴ allows for a direct engagement with legal texts. What we mean by text here is multifaceted; we can think of text in the conventional sense as an amalgam of characters, words, sentences and paragraphs on the printed page or screen, or adopt a wider definition to include, to borrow terminology from conversation analysts, talk-in-interaction. So, at the recent Current Legal Issues Colloquium on Law and Language a number of scholars applied literary or other methods of analysis (such as pragmatics, semantics, or discourse analysis) to a range of legal texts, be they legislation, court judgments, contracts, pre-recorded witness statements or police interviews.⁵ Utilising this wider view of text, therefore, allows us to view familiar objects of study through a different lens. The absurdities of courtroom interaction, for

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¹ AG Amsterdam and J Bruner, *Minding the Law: How Courts Rely On Storytelling, and How Their Stories Change The Ways we Understand The Law – and Ourselves* (Harvard University Press 2000), 110.

² A cursory glance at the contents of this journal evidences this suspicion.

³ See, for instance, Aristodemou, who explores a number of literary texts so as better understand the discourse of law and rewrite law's stories: M Aristodemou, *Law and Literature: Journeys From Her to Eternity* (OUP 2000).

⁴ Or law *as* language.

⁵ Current Legal Issues Colloquium 2011 - Law and Language, University College London, 4-5 July 2011.

instance, may become meaningful if one adopts the perspective of conversation analysis.⁶ One is aware that one is drawing the boundaries of law and literature broadly here, to encompass a range of approaches that all share a common, but loose, interdisciplinary approach to the study of legal phenomenon. Defining the boundaries of a territorial field is an activity that is inevitably fraught with danger⁷ and one that is not necessarily fruitful. It does, however, allow us to see commonalities, as well as discontinuities, in the range of methods adopted in the analysis of law. Taking a broad view of law *as* literature, or law *as* language, therefore, assists in the critique of law and legal processes. Taking one such stream of such law *as* language research, that which concerns the construction and reception of stories within the courtroom, we can conceive of a number of different methods appropriate for exploring the field. Kjus' *Stories at Trial*, follows, somewhat faithfully, although much can be said for the analysis therein, an approach to the analysis of courtroom discourse that draws inspiration from Bennett and Feldman's *Reconstructing Reality in the Courtroom*.⁸ While Kjus both borrows from this extant research and adds to it, his failure to look much beyond this literature leaves many omissions and unanswered questions.

These omissions and unanswered questions will be explored while outlining the main thread of the narrative. The format of the work is very much that of a doctoral thesis; the book opens with a short introductory chapter that incorporates a brief literature review while chapter 2 builds upon this literature review through an analysis of narrative. There follows a short methods chapter. Next are three substantive analysis chapters (4-6) and chapter 7 summarises the findings and identifies further avenues for research. Undoubtedly, the following of the

⁶ See JM Atkinson and P Drew, *Order in Court: The Organisation of Verbal Interaction in Judicial Settings* (Macmillan 1979), commenting upon P Carlen, *Magistrates' Justice* (Martin Robertson 1976).

⁷ JB Baron, 'Law, Literature, and the Problems of Interdisciplinarity' (1999) 108 *Yale Law Journal* 1059.

⁸ WL Bennett and MS Feldman, *Reconstructing Reality in the Courtroom: Justice and Judgement in American Culture* (Tavistock 1981). Additionally, Kjus also draws upon Labov's evaluation model in his exploration of courtroom narratives: W Labov, *Language in the Inner City: Studies in the Black English Vernacular* (Blackwell 1977).

conventional route results from the genesis of the monograph (as a doctoral thesis), but the result is that the reader has to wade through a couple of uninspiring chapters before the work comes to life. The literature review in the introduction is largely a descriptive account of work that explores the importance of narrative in the courtroom. As one would expect, Bennett and Feldman's work, *Reconstructing Reality in the Courtroom*,⁹ is the starting point for an exploration of narrative production in the courtroom. For Bennett and Feldman, juries in a criminal trial assess the evidence through the construction of narratives. Both the defence and prosecution build competing narratives of the case and the jury works to assess the credibility of narratives through their internal coherence and whether they are consistent with external reality. Due regard is also given to Bernard Jackson's insight that as well as exploring the narrative *in* the trial, we should also have regard to the narrative *of* the trial.¹⁰ That is, in addition to looking at the narratives of the events that are in issue in the case, we can view the case itself as a drama with an unfolding narrative. The performances of witnesses, advocates and the judge can be conceived as an unfolding story, and the work that actors undertake in the trial can influence the outcome. Further support for the importance of narratives within the trial is elucidated from the work of Pennington and Hastie,¹¹ confirming the importance of narrative construction for the interpretation of evidence by jurors, and Wagenaar et al., who look at how jurors use the evidence in the case to anchor narratives.¹² At this stage, other than the criticisms each of these studies make on the earlier studies, there is little in the way of in-depth analysis; a relatively uncritical synopsis is provided, and this descriptive approach follows into the subsequent exploration of the Norwegian criminal justice system.

⁹ *ibid.*

¹⁰ BS Jackson, *Fact, Law and Narrative Coherence* (Deborah Charles 1988).

¹¹ N Pennington and R Hastie, 'The Story Model for Juror Decision Making' in R Hastie (eds) *Inside the Juror: The Psychology of Juror Decision Making* (CUP 1993).

¹² WA Wagenaar, PJ van Koppen and HFM Crombag, *Anchored Narratives: The Psychology of Criminal Evidence* (Harvester Wheatsheaf 1993).

Kjus outlines the broad structure of the criminal court system in Norway; first instance decisions are made within a two tier court system with the district court being the court of first instance. For some less serious cases, where a full confession has been made, the case can be fast tracked and heard before a judge sitting alone. Otherwise, the court usually consists of a presiding judge with two lay assessors. These lay assessors, we are informed, are selected by drawing lots from a candidate list. Juries will only preside if the case is appealed to the court of appeal; the case can be heard again if there is a disagreement, *inter alia*, over the evidence. For less serious offences, the case will be heard by a panel of professional judges and lay assessors; only for cases with a maximum penalty of six years or more will a jury be impanelled. The work on the interpretation of narratives within the courtroom that Kjus relies upon in his brief literature review largely deals with the question of how *jurors* interpret evidence in narrative form. Yet, within Norway, all cases at first instance and, one presumes as no figures are provided, the majority of cases in the Court of Appeal are presided over by a professional judge with lay assessors.¹³ This inevitably leads one to ask, should the narrative framework suggested by Bennett and Feldman be accepted so uncritically?¹⁴ Within England and Wales, for instance, there is an assumption that magistrates, despite their lay status, approach their fact finding task differently from juries. Because they are case hardened, it is said, for instance, that magistrates are more willing to accept police evidence uncritically.¹⁵ We presume that magistrates are, to some extent, case

¹³ Within England and Wales, to simplify somewhat, defendants can elect jury trial for all offences with a maximum sentence of 6 months, yet a small minority of all cases are disposed of via jury trial (P Darbyshire, 'An Essay On the Importance and Neglect of the Magistracy' [1997] *Criminal Law Review* 627, reminds us that around 95 per cent of all criminal cases are dealt with in the magistrates' court while in the Crown Court, guilty pleas reduce the importance of jury trial). In Norway, as jury trial only takes place on appeal for crimes with a maximum of 6 years or more, we could expect jury trial to be of equally marginal importance.

¹⁴ On page 2 Kjus notes how Bennett and Feldman's work concerned the interpretation of narratives by 'judge or members of the jury', yet, within the same paragraph, the focus is switched to how the 'judge' interprets evidence, with reference to the jury dropped or implicit in the catch all category, also used, of 'decision-maker'.

¹⁵ M McConville, J Hodgson, L Bridges and A Pavlovic, *Standing Accused: The Organisation and Practice of Defence Lawyers in Britain* (Clarendon 1994).

hardened, but not to the extent of professional judges in the magistrates' court.¹⁶ Similarly, particularly after Auld's proposal for a mid-tier court, with professional magistrates sitting with lay colleagues,¹⁷ there are debates as to whether lay assessors, sitting with professional judges, would be sufficiently independent of their professional peers.¹⁸ Turning to work conducted within the US, both Conley and O'Barr and Sally Engle Merry have explored the construction of reception of cases within small claims courts.¹⁹ Both studies, although adopting different language, show how litigants construct cases through the adoption of either a rule or relationship framework. Conley and O'Barr, in particular, look to the frameworks adopted by judges and show how judges can adopt a rule (substantive or procedural), relational or mediation perspective. These perspectives thereby influence how judges deal with either rule or relational litigants. Rule orientated judges, for instance, speak the same language as rule orientated litigants. Furthermore, Conley and O'Barr assert that rule orientated discourse is the discourse of men, of the middle class, of the powerful, and of the law. Perhaps, we could say, the story, recognised by Bennett and Feldman as central to adjudication by juries, is best understood as a relational approach in contrast to the legal analysis of lawyers. We could hypothesise, therefore, that the approach of professional judges will be subtly different from case hardened lay assessors (or magistrates) which will be different again for one shot or seldom shot lay assessors or juries. The lack, therefore, of juries in trials in Norway, results in a real need to justify the uncritical adoption of Bennett and Feldman's framework.

¹⁶ R Morgan and N Russell, *The Judiciary in the Magistrates' Courts*, RDS Occasional Paper No 66 (Home Office 2000).

¹⁷ Auld, *Review of the Criminal Courts in England and Wales* (HMSO 2001).

¹⁸ For a discussion of the relationship between the lay and professional magistracy, see: A Sanders, *Community Justice: Modernising the Magistracy in England and Wales* (IPPR 2001).

¹⁹ JM Conley and WM O'Barr, *Rules versus Relationships: The Ethnography of Legal Discourse* (University of Chicago Press 1990), SE Merry, *Getting Justice and Getting Even: Legal Consciousness among Working-Class Americans* (University of Chicago Press 1990).

Of course, as the legal framework within which Kjus works will be of second nature to him, there may well be a natural degree of myopia on these issues. However, the adoption of a law *and* literature or law *as* literature approach, is promoted, inter alia, as enabling researchers to make the familiar strange and the strange familiar.²⁰ In this regard, *Stories at Trial* fails to question the familiar.

Chapter 2 begins with a simple definition of narrative that is then refined. So, narrative can be both real and imagined,²¹ ‘uttered representations’ rather than ‘linguistic representations’,²² of ‘courses of events’.²³ The chapter also considers the (mainly psychological) literature on narrative construction and interpretation. Focusing upon schema and scripts, Kjus describes how we interpret the world through narrative, both in the construction and interpretation of the stories that we use to constitute social reality. ‘Underlying narrative models’²⁴ therefore allow for us to make sense of the world, both in the telling and interpreting of stories. This review, while offering no real new insights or evaluation, does provide a useful synopsis of the literature, if a little too focused upon work in the psychological field. For instance, the emphasis on scripts and schema is to the exclusion other approaches that speak to the construction of narratives such as ethnomethodology and conversation analysis. Such approaches, looking at the construction of utterances in situ (and Kjus, as referenced above, views narratives as ‘uttered representations’) usefully dovetail with the psychological approach. Narratives, for instance, when delivered in talk-in-interaction, have to be placed in a sequence of turns within conversation in a manner that fits with the preceding

²⁰ Amsterdam and Bruner (n 1).

²¹ Although Kjus states that this distinction is unhelpful.

²² 14.

²³ 15.

²⁴ 31.

conversation.²⁵ Narratives that do not fit in this way are likely to be rejected as irrelevant, in the same way that, following the psychological literature, narratives that do not conform to what Kjus describes as ‘underlying narrative models’ will be rejected as fanciful or reinterpreted in a manner consistent with dominant narratives.²⁶ Since the pioneering work of Atkinson and Drew²⁷ which applied the findings of conversation analysis to courtroom discourse, there has been an increasing recognition of the role of the question and answer sequence in the courtroom in the elicitation of courtroom discourse. Narratives in court, particularly if delivered in testimony, are rarely delivered fully formed, but rather, largely as a result of the control of witnesses by lawyers, are delivered in fragments, with the advocates asking questions of witnesses so as to provide a broad narrative of the case.²⁸ Furthermore, as O’Barr shows, fragmented narratives can be regarded as an example of ‘powerless speech’ in the courtroom, and the adoption of powerful or powerless speech is thought to impact upon credibility.²⁹ This is an insight missed by Kjus, who frequently tells the story of the case as a coherent narrative constructed from the fragments of testimony. For instance, the narrative on page 49 is offered as a coherent whole, and Kjus acknowledges that this is constructed from dialogue between the defendant and judge.³⁰ If the fragmentation of narratives impacts upon how they are received, simply presenting them as a coherent whole and analysing them as whole, glosses over the interpretive work that takes place in the construction of this whole

²⁵ AL Ryave ‘On the Achievement of a Series of Stories’ in J Schenkein (ed), *Studies in the Organization of Conversational Interaction* (Academic Press 1978) and G Jefferson, ‘Sequential Aspects of Storytelling’ in J Schenkein (ed), *Studies in the Organization of Conversational Interaction* (Academic Press 1978).

²⁶ JB Baron and J Epstein, ‘Language and The Law: Literature, Narrative, and Legal Theory’ in D Kairys (ed), *The Politics of Law: A Progressive Critique*, 3rd ed (Basic Books 1998) and JB Baron, ‘The Many Promises of Storytelling in Law: An Essay Review of *Narrative and the Legal Discourse: A Reader in Storytelling and the Law.*’ (1991) 23 *Rutgers Law Journal* 79.

²⁷ n 6.

²⁸ S Harris, ‘Fragmented Narratives and Multiple Tellers: Witness and Defendant Accounts in Trials’ (2001) 3 *Discourse Studies* 53.

²⁹ WM O’Barr, *Linguistic Evidence: Language, Power and Strategy in the Courtroom* (Academic Press 1982).

³⁰ Furthermore, Kjus notes that the narrative was elicited through questioning that he describes as ‘sympathetic’. Had Kjus included ethnomethodological literature, he would have questioned whether such a ‘sympathetic’ approach would have coloured the narrative. See, S Cammiss and C Manchester, ‘“It is not my intention to be a killjoy...”: Objecting to a Licence Application - The Complainers’ (2012) *International Journal for the Semiotics of Law* (forthcoming).

from the fragments. Within the literature review, Kjus acknowledges how narratives may result from either a negotiation ‘in a dialogic social setting’ or ‘presented to an audience in a more closed format, as some kind of package’,³¹ yet, as we see above, there is no analysis of what this means for courtroom narratives. So, while in chapter 1 Kjus references Jackson³² who points to the importance of understanding the story *of* the trial in interpreting in the story *in* the trial, this is one aspect of narrative construction in the courtroom that is not sufficiently considered.

Furthermore, there is an important omission in the psychological literature on narrative construction and interpretation. Kjus points to the importance of schema and scripts in the construction of ‘underlying narrative models’.³³ To adopt the terminology of Van Roermund, Kjus does not elaborate whether ‘interpretation’ or ‘event’ takes priority in the construction of narratives, or whether narrative construction is both a ‘top down’ and ‘bottom up’ process.³⁴ Prioritising ‘event’, for instance, leads to an understanding of narrative construction whereby the narrative is constructed in light of the events that make up the story, whereas prioritising the ‘interpretation’ would suggest that events are selected in light of wider discourses that frame the narrative. In short, what we see is determined by our world view. Given Kjus’ adoption of a framework that focuses upon schema and scripts, we could expect that ‘interpretation’ is, at the very least, influential in the construction of narratives. But is it, in Kjus’ view, determinative? Van Roermund rejects such a radical view in favour of narrative construction being both ‘top down’ and ‘bottom up’; both events in the world and our interpretations of the world are influential in the construction and interpretation of narratives. Kjus needs to tackle this important question; when analysing narratives within his

³¹ 15.

³² n 10.

³³ 31.

³⁴ B van Roermund, *Law, Narrative and Reality: An Essay in Intercepting Politics* (Kluwer 1997).

sample he deals with problematic narrative constructions that are adopted in the determination of cases he regards as ambiguous. If Kjus adopted the radical position of interpretations determining narrative constructions, then the problem is one of discourse, and thereby how to make legal discourse anew or challenge the problematic narrative constructions utilised in the determination of cases. If the less radical ‘top down’ and ‘bottom up’ view is taken, then construction is a much more creative process, although still framed by dominant ways of seeing, with some room for the criticism of individual actors on the choices taken in the construction of narratives. One suspects that he adopts a ‘top down’ and ‘bottom up’ approach to the reception of narratives: he states that the narrator, ‘can never be certain that the receiver will recontextualise the narrative in the way the narrator had in mind’,³⁵ thereby suggesting a degree of freedom, rather than pure constraint, in the choice of schema utilised in interpretation. Similarly, while performing an analysis of his cases, Kjus notes that ‘There is no automatic mechanism that decides which particular narrative framework the judges will apply as the key to understanding the case’.³⁶ There is, therefore, a view inherent in his analysis of narrative interpretation being flexible, but there is no explicit engagement with the questions addressed by van Roermund.

Chapter 3 is a description of the methods adopted in the research. While the limitations of a lone researcher inevitably colour the methods chosen, with serendipity and chance often playing decisive roles in the selection of research sites and cases, Kjus nevertheless fails to fully justify a number of important decisions. We are told that cases were observed within 2 courts, with little explanation of why these two were chosen. For instance, following from, for example, Parker et al’s work,³⁷ were the courts chosen on the basis that one was a busy

³⁵ 27.

³⁶ 81.

³⁷ HJ Parker, M Casburn and D Turnbull, *Receiving Juvenile Justice: Adolescents and State Care and Control* (Blackwell 1981).

city court, and another a more relaxed suburban or rural court? Or was there some other justification? In total 23 cases were observed and either recorded and transcribed (11) or notes taken (a further 12); were only 23 cases observed due to costs, time or any other reason? In choosing cases, we are told that Kjus focused upon those that did not generate media interest (so as to ensure anonymity) and were relatively short, largely one day cases (so as to assist with transcription etc). One is sympathetic to approaches that recognise the limitations of the lone researcher, especially when conducting deep ethnographic and qualitative research of this type, yet there is no attempt to explain whether these cases are somewhat representative of the types of cases these courts routinely process.³⁸ Of the 23 cases, 15 were allegations of violence; one suspects that this is in no way representative of the staple diet of most courtrooms, and Kjus asks this of his sample. Does this matter? In previous work I have noted how the construction of courtroom narratives in dishonesty cases have to deal with a regular problem; the placement of the defendant in centre stage. For offences of violence, there is usually little problem here; the victim will claim that the defendant assaulted her, with a further description of the event. However, for dishonesty offenses (such as burglary), the narrative of the case may require a more creative construction; statements from victims largely account for the loss of property and the authorities then have to construct a wider narrative that places the defendant at the centre.³⁹ There is more reliance here upon the acts of authorities in arresting and questioning the defendant, and work needs to be done to explain the offence via questions of motivation and the like. Given Kjus' interest in the use and construction of underlying narrative models, the lack of dishonesty cases in his sample seems to be a weakness as an analysis of these cases would assist in the building of the argument.

³⁸ Of course, given the aims of the research – an in-depth examination of narrative construction – the researcher is not necessarily looking for typical or representative cases. This is particularly defensible in an area where little empirical work has been undertaken. Nevertheless, a justification such as this (although, of course, more elaborated than here) needs to be provided.

³⁹ S Cammiss, *Determining Mode of Trial: Exploring Decision Making in Magistrates' Courts* (VDM Verlag 2009).

Furthermore, there is no description of why these particular cases were chosen from the range of cases available at the court venues.

Chapter 4 sees the start of the substantive analysis chapters, starting with ‘Negotiations With Narratives’. It is here, in these analysis chapters that, despite the limitations in the work, we see the strengths of the book. In the examination of extant literature, the book really fails to break new ground and contains a number of important omissions. But, within the analysis chapters there is a well worked examination of the reception and construction of narratives in the courtroom. Kjus excels in a close and perceptive reading of the individual cases in his sample, a reading that is rewarding for those interested in narrative within the courtroom and courtroom communication more generally. We also see the real benefits of narrative research; while qualitative work can proceed on a fragmentation of the data – data is coded into discrete topics and each topic analysed in turn – the analysis of narratives inevitably leads to a focus on prolonged segments of text. We therefore get to observe the work achieved by courtroom participants in context; we see a fuller picture of the work that is performed by social actors in the creation of the social world. Chapter 4 is focused on the use and construction of narratives in the art of persuasion and rhetoric, focusing both upon explicit and implicit techniques.⁴⁰ Despite the comment above on the low number of cases in the sample, chapter 4 quickly moves to a prolonged analysis of a single case; Kjus provides a persuasive examination of the presentation of evidence in this case. It is a case of domestic violence and Kjus notes that the defendant and complainant, in their narrative constructions, clash over the presentation of self and who is the cause of wider relationship problems:

⁴⁰ This is linked to what Labov describes as internal and external evaluation: n 8.

The man's narrative has as its theme *a woman who attempts desperate measures to keep the man*. The woman's narrative has as its theme *a... violent man who escapes realities (and the consequences of his own acts) but who is caught up by them*.⁴¹

These narratives may be familiar to many in problematic relationships; we tell stories in such situations as accounts that justify our actions and seek to reinterpret the actions of others in a manner consistent with our view of self. However, as noted by many other writers on legal narratives, the stories provided by the participants are re-inscribed into the register of the court.⁴² Nevertheless, Kjus provides an important insight here; while legal judgments 'transform the presentation from a personal narrative into court minutes'⁴³ the complainant's perspective remains, largely due to the investment of credibility into her narrative at the expense of the defendant. While Kjus fails to engage with the literature on the creation of specifically *legal* narratives, there are insights here that subtly critique and build upon that work. The creation of legal narratives is said to involve a translation from lifeworld narratives into legal narratives; and in such a translation something is lost.⁴⁴ For White, the art of 'legal translation' is to create an ethical translation where the language of the client somehow survives. I have previously stated that the construction of legal narratives inevitably results in the loss of the client's story; the criminal law's concern with legal categories of *mens rea*, *actus reus* and defences means that lawyers listen to stories so as to fit with these criteria.⁴⁵ Lifeworld concerns as to blame, for instance, do not necessarily fit with legal conceptions of

⁴¹ 57.

⁴² See, for instance, Scheppele, who describes legal stories as focused upon 'when "the trouble" began, and fans out in the direction of legally relevant facts': KL Scheppele, 'Foreword: Telling Stories' (1989) 87 *Michigan Law Review* 2073, 2073. Further support for this point can be found in RK Sherwin, 'A Matter of Voice and Plot: Belief and Suspicion in Legal Storytelling' (1988) 87 *Michigan Law Review* 543 and JB Manzo, 'Juror's Narratives of Personal Experience in Deliberation Talk' (1993) 13 *Text* 267.

⁴³ 54.

⁴⁴ JB White, *Justice as Translation: An Essay in Cultural and Legal Criticism* (University of Chicago Press 1990). Kjus refers here to Nils Christie's seminal article, 'Conflicts as Property' (1977) 17 *British Journal of Criminology* 1, to make a similar point.

⁴⁵ S Cammiss, "'He's Goes Off and I Think He Took The Child": Narrative (Re)Production In The Courtroom' (2006) 17 *Kings College Law Journal* 71.

mens rea. Within Kjus' analysis, however, we can see how the lifeworld narrative survives. My earlier work concerned the mode of trial hearing; an administrative hearing focused upon the determination of venue. This hearing, therefore, was not concerned with the eventual outcome.⁴⁶ Kjus shows how the lifeworld narrative influences the legal narrative through the assessment of credibility. The construction of coherent stories that correspond to the world view of decision makers leads to an investment of credibility, and the narratives of the courtroom in Kjus' sample show how credibility assessments are based on the narratives delivered by the participants. To those not versed in the law and narrative literature, this may seem a trite statement; that credibility is vested in courtroom actors on the basis of the coherence of their narrative and how it accords with standard world-views. Yet, given the claims in the literature that narratives are transformed in legal settings, and that clients need to frame their problems in legal language, or subject their stories to legal translations, Kjus' analysis reminds us that lifeworld stories are important in the assessment of credibility. Nevertheless, Kjus goes on to show how there remains a degree of legal translation; continuing the analysis of this case Kjus notes how some aspects of the complainant's narrative are omitted from the judge's narrative, and these omissions relate to what is not *legally* relevant in the case.

A similar focus upon the importance of the *legally* relevant in the construction of narratives can be found in Kjus examination of the importance of chronology in narrative, also in chapter 4. Legal narratives are said to focus upon the 'trouble' with the narrative constructed with this as its starting point.⁴⁷ In an assault, for instance, the trouble is the instance where the defendant is said to strike the victim. Yet lifeworld narratives may be based upon different chronologies, with the trouble not being as foregrounded as in a legal narrative. A defendant,

⁴⁶ As the decision was to be made by magistrates on the basis that the prosecution could prove their version of events, as per the Mode of Trial Guidelines [1990] 3 All E R 979.

⁴⁷ See Scheppele (n 42).

for instance, may want to draw back the chronology so as to place the ‘trouble’ in a wider narrative, one which excuses, justifies or explains the assault. Complainants may also want to extend the horizons of the narrative, so as to take in events that describe the defendant’s motive or purpose. So, on page 74 Kjus analyses a defendant’s narrative where the ‘trouble’ is the climax of the narrative, with earlier events explaining why this took place, thereby suggesting that the defendant acted in self-defence. His claim was that, ‘she has struck him with dangerous objects on previous occasions; in this fight she struck first; it was a wild and dangerous fight; dangerous objects were in reach.’⁴⁸ Yet this attempt was rejected in the judgment of the court; the timeframe for the events was collapsed, with the claim of self-defence evaluated within this restricted time frame; when the defendant assaulted the victim, he ‘had control over the complainant’,⁴⁹ thereby leading to a rejection of the defendant’s claims. The construction of this narrow narrative frame assisted in the presentation of the defendant’s claims as not being credible. So, while above I suggested that Kjus does point to wider lifeworld narratives as potentially being important in the investment of credibility in witnesses, we see here a specific example of how the construction of a *legal* narrative, focused upon the act, the ‘trouble’, leads to a rejection of the claims made in the defendant’s wider narrative. Similarly, in assessing a case where the defendant was alleged to have kicked police officers who restrained him in his cell, rather than look to the events which preceded the incident – which the defendant claimed were important as they categorised the officers’ actions as unreasonable – the prosecution adopted a view that shorted the narrative to focus upon the incident above:

In a criminal case, the assumed punishable offence is a reasonable terminal point for such a short highlighted sequence, for example when the leg of the prisoner hits the guard. But when does the

⁴⁸ 74.
⁴⁹ 74.

episode that can explain the kick commence? The time sequence for the guard commences immediately before the kick. *He looks at me, and then he kicks.*⁵⁰

This shortening of the time frame is a claim that, '*This is what is essential, this is where we find the meaning.*'⁵¹

Within chapter 4 we also see work from Kjus that looks to the importance of scripts and schema in the construction of what is termed 'cultural key narratives'.⁵² These are influential in both the construction and interpretation of narratives. On a basic level, we can see this in the difficulty that one defendant had in attempting 'to convince the judges that the man was afraid his wife would attack him with bottles and glasses.'⁵³ While we are familiar with the narrative schema of women afraid of their partners, the counter narrative, that some men are afraid, 'goes against the grain of old and traditional expectations about the relations between the genders.'⁵⁴ There is a deep analysis of one particular case (case 5) from page 81, where the defendant was alleged to have assaulted a police officer. Both sides in their depiction of this case attempted to draw upon a wider 'macro-narrative'⁵⁵ to make sense of the events. The prosecutor described the events in the standard narrative of a city centre altercation with the police; hard working police officers attempt to deal with a dispute outside a fast food restaurant while the defendant, drunk and impulsive, assaults a female police officer, both verbally and physically, who is just trying to do her job. The defence, however, draw upon what Kjus terms as a 'counter-narrative'⁵⁶ and describes the prosecution narrative as too

⁵⁰ 70.

⁵¹ 70.

⁵² 78.

⁵³ 76.

⁵⁴ 76.

⁵⁵ 80.

⁵⁶ 94.

‘canonical’;⁵⁷ it being too simple an explanation, there must be something missing. The defence, in focusing upon the main incident (the dispute being whether the defendant justifiably pushed the victim, causing her to fall, or whether he lifted her up and threw her onto a car) drew upon a narrative of shame and humiliation; the defendant, in causing the officer to fall, embarrassed her, and the resulting arrest and prosecution were an over-reaction to an unfortunate incident. Other details in the narrative were questioned so as to problematise the canonical narrative; how, for instance, is a man able to lift and throw a police woman by merely grabbing her jacket? For Kjus, however, the important point is how each characterisation of events draws upon a dominant narrative; be this one of unruly and drunken men on a night out or how we overact when embarrassed.⁵⁸ In drawing upon these ‘macro-narratives’, each party thereby ‘underline, accentuate and sharpen patterns that pull towards the macro-narrative in question, and suppress, flatten and forget what does not fit’.⁵⁹

Chapter 5, ‘Comprehensive Assessment’ builds upon the use of narrative models in legal proceedings, but with a focus now upon the construction of narratives by judges.⁶⁰ Of particular interest here is the use of narrative models to build a case when the evidence is indirect. Kjus, for instance, looks to Burke’s narrative ‘pentad’,⁶¹ useful because ‘the meaning of a narrative rests on expectations of predictable connections’ between ‘act, scene, agent, agency and purpose’.⁶² So, when there is a lack of narrative detail and the evidence is indirect, narrative models assist in filling in the gaps. So, the argument advanced is that narrative models are used to interpret the evidence in a manner that takes ambiguous

⁵⁷ 94.

⁵⁸ Both of these could be described as examples of ‘script formulations’: D Edwards, ‘Moaning, Whinging and Laughing: The Subjective Side of Complaints’ (2005) 7 *Discourse Studies* 5.

⁵⁹ 102.

⁶⁰ Within the Norwegian system, judges have to give reasons for their decision, and do this, inter alia, through the construction of a narrative of the case in the judgment.

⁶¹ K Burke, *A Grammar of Motives* (University of California Press 1984).

⁶² 130.

evidence and reinterprets this in line with an overarching ‘cultural narrative’ of the case. A good example is provided by Kjus from page 136 onwards in the analysis of an embezzlement case. The defendant was a driver for a company and, while he and a colleague were driving the company van and making deliveries, a sum of money and a payment terminal went missing. No-one saw the money and terminal being taken, and it could have been taken by the defendant, his colleague or someone else. Kjus argues that the case was built upon the defendant’s suspect character; referring to Burke’s pentad, ‘The judgment lets the act itself be implied by other factors in the pentad’.⁶³ In short, the defendant is convicted on the basis of an underlying narrative that we recognise as plausible and coherent:

A young man starts to use drugs, and quite soon he is a victim of his bad habit. He does not understand how dependent he is and what his dependency does to his ability to function normally and responsibly. The substance use affects him directly, because the drugs are expensive, and indirectly, because his perception of reality is distorted, to the ruin of his financial situation. One day at work, when he has a large pile of cash in his hand, the temptation becomes too strong. He believes nobody can prove it if he takes the money. He believes that as long as he can keep the lie going that the money just vanished he will be ok.⁶⁴

For Kjus, each of the elements of this story has a flimsy basis in the evidence, yet it is the story as a whole that works to convict the defendant. ‘The judgment plays on reader’s recognition of this narrative, expecting that it will also be in the readers’ mind in the paragraph where nothing explicit is said about drugs.’⁶⁵

⁶³ 137.

⁶⁴ 146.

⁶⁵ 146.

Chapter 6, 'Shifting Credibility', is an analysis of the means by which social actors within the courtroom attend to their sense of self. Drawing upon work such as Goffman's,⁶⁶ Kjus looks to how courtroom actors 'work up'⁶⁷ credibility when making statements. So, for instance, a police officer uses reporting language so that 'it is less the individual officer and more the uniform speaking.'⁶⁸ Similarly, describing what is termed 'liveness'⁶⁹ – the provision of an account made to seem real, through strategies such as the delivery of a 'real time' action sequence, thereby demonstrating reliability – 'the narrator demonstrates his or her reliability by giving a live and competent description of events'.⁷⁰ Witnesses may characterise the passivity of an action by noting that 'I walked' while others may say that he 'ran',⁷¹ while disagreements can be downplayed by a witness stating that 'I said' rather than 'he shouted'.⁷² These are examples of what Potter analyses as techniques utilised when 'working up' descriptions of the world so as to appear reasonable and credible.⁷³ Once again, a failure to explore related literature in the ethnomethodological tradition closes down fruitful lines of enquiry. It also leads Kjus to somewhat misunderstand rhetorical practices. For instance, he notes how a prosecutor adds to a police officer's statement (by including the adjectives surprised and dizzy), when 'she said she was shocked and confused, but she did not say surprised and quite dizzy'.⁷⁴ For Kjus, this is a problem, because while the meaning is more or less the same, he wonders why the prosecutor added these terms. Such 'active voicing'⁷⁵ is merely a rhetorical technique, adopted so as to add a degree of 'authenticity' to the statement. When we paraphrase the words of others in everyday conversation, we do so with this in mind, and our audience do not expect accuracy in our quotations, only fidelity to the original

⁶⁶ E Goffman, *The Presentation of Self in Everyday Life* (Anchor Books 1959).

⁶⁷ J Potter, *Representing Reality: Discourse, Rhetoric and Social Construction* (Sage 1996).

⁶⁸ 155.

⁶⁹ 156.

⁷⁰ 157.

⁷¹ 173.

⁷² 173.

⁷³ Potter (n 67). Edwards (n 58) describes similar practices.

⁷⁴ 200.

⁷⁵ Potter (n 67).

source of the words. Legal settings, while subject to institutional constraints, still share features of the everyday conversational practices that we routinely adopt.⁷⁶

A substantial part of this chapter deals with what Kjus describes as ‘shifting credibility’; the means by which judgment is made as to which witness is credible.⁷⁷ In a series of five cases Kjus looks to how narrative models and ‘comprehensive assessments’ – a term defined earlier as viewing the evidence ‘as a comprehensive entity’; ‘An expressed ideal is that whoever judges in a criminal case should undertake a comprehensive assessment’⁷⁸ – interact in the investment of credibility. The claim that Kjus makes is that narrative models work in a manner that avoids the necessity for a ‘comprehensive assessment’ of all the evidence. Rather, judgments are constructed on narrative models with only a partial assessment of the evidence. Either narrative models of the case are constructed and the credibility of the witnesses are thereby implied or the evidence is used to partially assess credibility on key points of dispute and narrative models are built from these determinations, with wider assessment of the evidence then bypassed. So, when building narrative models after credibility has been assigned, the credibility of a witness is assessed on either the coherence of a narrative or its correspondence with the world view of judges: ‘While it appeared that the complaint kept changing what she had experienced, both when it came to the acts and the chronology, the defendant presented a simple chronology which he steadfastly maintained.’⁷⁹ Alternatively, we can see in some cases the selection of a narrative perspective at the outset of the judgment that leads inevitably to a shift in credibility between witnesses: ‘when starting with a given perception, one will in particular notice the information that confirms this idea, interpret neutral information as if this information confirms the idea and often

⁷⁶ Cammiss and Manchester (n 30).

⁷⁷ This is similar to what McConville et. al. describe as ‘investing credibility’ (n 15).

⁷⁸ 105.

⁷⁹ 179.

ignore information that speaks against it.’⁸⁰ This is not to say that assessment of the evidence is unimportant, only that it is not necessarily comprehensive. The existence of detailed judgments on the facts within the Norwegian system allows for Kjus’ most interesting insights; we can see how narrative frameworks are used to invest credibility as judges construct a version of the facts. So, while Kjus describes credibility as a balance – more for one witness means less for another – it is not necessarily a zero sum game (although sometimes it is). This also allows for an appreciation of wider narratives. So, while judgments may focus upon *legal* narratives, the wider narratives provided by defendants and witnesses are important, as they impact upon credibility and believability.⁸¹

Within all the analysis chapters there appears to be an elephant in the room that is not directly addressed. While the detailed analysis of the judgments allows for an interesting examination of the interplay between narrative models and the assessment of evidence, wider ‘narratives’ of power, race, class or gender are merely implied. So, in the rape case analysed from page 175, there is no explicit analysis of the role of gender in the construction of cultural narratives. Kjus remarks on how the credibility of the witness is questioned through a narrative model; how could the witness continue a relationship with the defendant after the allegation of rape?⁸² Furthermore, the case ‘opens by stating that... the complainant had sexual intercourse with a man other than her spouse, this giving her co-responsibility for the “bad things” that happen between them’.⁸³ In a theft case involving a ‘gypsy’,⁸⁴ the prosecutor reports that ‘there is a major problem with people from the former Eastern Europe who arrive in Norway

⁸⁰ 143.

⁸¹ Earlier I questioned how Kjus could uncritically adopt the Bennett and Feldman framework given that this work is largely focused upon juries, not judges (n 14 and associated text). We can see here, however, how the necessity for a reasoned decision from judges helps to illuminate the narrative construction practices of the decision maker in a way that is not possible with a silent jury verdict. There are seeds here of a justification for the adoption of the narrative model in this framework, but as Kjus does not acknowledge the problem of adopting this model, he is not able to mount this defence to this particular criticism.

⁸² 184.

⁸³ 189.

⁸⁴ 134.

with the sole purpose of stealing.⁸⁵ This racist narrative is not more closely scrutinised by Kjus. Similarly, in a case concerning an assault against a police officer, Kjus notes that the defendant's statement 'hints at a racist motive' on the part of the police,⁸⁶ but that this accusation was reproduced in the court judgment ironically. In a case involving an accusation of theft against an employee, Kjus criticises the narrative used to convict the defendant⁸⁷ and comments that 'Basing a conviction on indirect argumentation may be a solution to the need to provide the employer with legal protection.'⁸⁸ In all of these cases, and others, wider narratives concerning race, class and gender discrimination within the courtroom could have been explicitly called upon to assist in the interpretation of the cases. Indeed, Bennett and Feldman use the narrative model as an explanation for bias within the criminal justice process, in that the narratives of the marginalised seem unbelievable to decision makers.⁸⁹ The study as a whole would have benefited with an engagement of the content of these wider cultural narratives and how they operate so as to further discrimination.

I am conscious that, on whole, this review essay reads as a simple, 'this is how I would have done it'. To some extent, this would be a fair criticism, in that any book inevitably has a restricted focus, especially if based upon empirical work conducted by a lone scholar.⁹⁰ Yet the limitations are important. The absence of any reference to the ethnomethodological tradition allows Kjus to uncritically construct narratives of his cases, thereby missing an important element of how they are constructed in situ. The failure to explore this literature also closes down a line of enquiry that would have enriched the work on presentation of self; Edwards' and Potter's work, for instance, looks to how we manage the impression we make

⁸⁵ 135.

⁸⁶ 172.

⁸⁷ See n 65 and associated text.

⁸⁸ 137.

⁸⁹ n 8.

⁹⁰ Kjus, in the final chapter, looks to further work that could be done and there is here an implicit acknowledgment of the place of the ethnomethodology, while not explicitly naming this approach.

on others when describing the world.⁹¹ The strategies that we adopt implicitly and explicitly place us in the world as reasonable and sincere beings. Furthermore, the absence of any justification as to why the narrative model should apply to judges, rather than juries, is problematic, especially as Kjus provides really interesting insights into how judges use the narratives of witnesses to construct a narrative of the case. Despite the limitations highlighted, this is a book that will be of interest to those interested in law and language, and courtroom communication more generally. The sophisticated analysis of the interplay of narrative models and the assessment of evidence, in particular, is a strength. The exploration of how wider narratives interact with the construction of a legal narrative, even though these legal narratives are inevitably partial in that there is a focus upon legally relevant details, is a valuable addition to our understanding of how narratives are constructed within the courtroom.

⁹¹ nn 58 and 67.